LOS ANGELES BAR BULLETIN

In This Issue

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LOS ANGELES
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VOL. 19 APRIL, 1944 No. 8

FIRST A GREAT DRUDGE

IF you ever sit in your office nights or Saturday afternoons or Sundays trying to devise some way to minimize the weakness of a weak spot, or trying to work out a plan to make the "deal" tax free, or looking up just one or two more cases as protection to your position in the event "he raises the point," *et cetera, et cetera,* and if you wonder sometimes if there is something wrong with you because you can not seem to do as the business executives do: that is, "make decisions" and let some one else do the work, and if you have moments of doubt and rebellion,—you may derive some satisfaction from these words of Daniel Webster:

> *"Accuracy and diligence are much more necessary to a lawyer than great comprehension of mind, or brilliancy of talent. His business is to refine, define, split hairs, look into authorities, and compare cases. A man can never gallop over the fields of law on Pegasus, nor fly across them on the wings of oratory. If he would stand on terra firma, he must descend. If he would be a great lawyer, he must first consent to become a great drudge."*

E. W. T.

A WORD FROM THE PRESIDENT

I WANT to express my thanks to the many members of the Association who have accepted committee appointments. No one has declined to share the tasks of the Association except for understandable valid reasons. Committee work is essential to the proper functioning of the organization and it is heartening to observe the willingness with which so many able busy lawyers dedicate a substantial amount of time to the welfare of the bar.

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I should like to suggest to the members of the Association that they plan to attend our regular and special luncheon meetings and, when possible, to bring a guest. We are endeavoring to make the Association better known to the public and particularly to the leaders of the community. The board will strive to present speakers who will discuss timely subjects informatively. Let us co-operate in making the Los Angeles Bar Association a community institution, commanding the respect and confidence of the public. Attendance at all meetings by the leaders of the city and county will help to achieve this objective.

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As it has been publicly announced, the Association will not take a plebiscite on judicial candidates. I should like to explain more fully the reason for such decision of the board. Under an amendment of the by-laws adopted at the November meeting it is discretionary with the board of trustees to take a plebiscite; but having determined to take a plebiscite, it is mandatory upon the board to conduct a vigorous campaign for the endorsed candidates. Under present emergency conditions, particularly critical shortages of print paper, envelopes, etc. and restricted manpower, it appeared to the board that considerable doubt existed whether the plebiscite could be taken at all, and even if it were accomplished there would be insufficient time between its completion and the primary election to conduct even a token campaign. The taking of a plebiscite even under normal conditions is a very costly procedure. The board did not feel justified in expending funds for the purpose under present conditions, and voted unanimously not to take the plebiscite.

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The board of trustees has voted unanimously to oppose the election of Dailey S. Stafford as judge of the Superior Court to

fill the unexpired term of office No. 14. Such action of the board was compelled by the record of Dailey S. Stafford while judge of the Superior Court, from which office he was recalled by the voters in a special recall election in 1932. The Los Angeles Bar Association sponsored and conducted this recall campaign. With the advice and approval of the board of trustees I have appointed a special committee to conduct a vigorous campaign in opposing Dailey S. Stafford. We can not and will not let his candidacy go unchallenged. I bespeak the united support of the bar in opposing his candidacy.

Harry J McClean

BY THE BOARD

Secretary and Treasurer appointed. The Board of Trustees has appointed Paul Nourse secretary, and Ewell D. Moore, treasurer of the Association, for the fiscal year 1944-1945. Both are members of the board. Mr. Nourse succeeded Alex W. Davis, who recently was elected junior vice-president. Mr. Moore's was a reappointment to the office of treasurer.

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New Trustee. Richard A. Turner was elected by the board as trustee to fill the vacancy on the board resulting from the elevation of Alex W. Davis to the office of junior vice-president. Mr. Turner's term will expire in February, 1945.

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Plebiscite. Paul Fussell (chairman), Fred Aberle, and Clyde C. Triplett were appointed by the president as a special committee to study the by-laws regulating the taking of plebiscites, and to make recommendations to the board as to a revision thereof.

* * *

Inter-American Bar Association. The board has renewed the Association's membership in the Inter-American Bar Association, which will hold its next meeting in Mexico City, July 31 to August 8, 1944.

A special committee was appointed to study the structure and activities of the Inter-American Association, consisting of Alexander Macdonald, Gurney Newlin, and Guy R. Crump. The president was authorized to appoint a delegate to attend the Mexico City meeting.

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Past Presidents' Committee. The board voted the reappointment of the Past Presidents' Committee for 1944-1945, with the addition thereto of William C. Mathes, who becomes chairman for the year 1944.

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Pleading and Practice. The annual report of the Committee on Pleading and Practice for 1943 was submitted to the board. It recommended that Section 2055 of the Code of Civil Procedure should be amended to conform to the Federal Rules of Civil Procedure, to include "the superintendent or managing agent of any partnership." This recommendation was approved by the board and referred to the 1944 Committee on Legislation.—E. D. M.

ON THE FIGHTING FRONT

Lt. Joseph S. Rogers is with the Air Corps in Italy, assigned to the intelligence service. He reports that the work is fascinating and attracts many attorneys.

During the past month the following names have been added to the Roll of Honor:

Binns, Walter S., Pvt., USA
Elmendorf, George F., Lt. (j.g.) USNR
Petty, Don E., Lt. (j.g.) USNR
Stewart, Jerome Tucker, Pvt., USA

SUSTAINING MEMBERS

In the February, 1944, number of the BULLETIN appeared a list of sustaining members as of February 10, 1944. There were 206 names in that list. The number now is 214. The following list contains the names of the eight new sustaining members:

Boone, Kirk E.
Ford, Hon. John J.
Herron, Mark L.
Hitchcock, E. E.
Meserve, E. A.
Odell, Robert A.
Schwab, Paul E.
Tyrrell, Hon. Frank G.

WITH THE SECTIONS

THE section plan of the American Bar Association recently was adopted by the Association for the purpose of bringing together those of its members who are interested in constantly reviewing the law of a particular field from the substantive and adjective viewpoints, and, wherever feasible, in recommending and promoting needed changes in the law of California.

For the purpose of encouraging active participation of members of the Association in the work of the sections, and with the objective of obtaining one thousand members, nominal yearly dues of $1.00 were established. Enrollment now has reached almost fifty per cent of the membership objective.

Lawyers may join any of the sections by submitting their applications to the office of the Association with a remittance of $1.00 for each of the following sections in which they may be interested:

Corporation, Banking, and Mercantile Law
Criminal Law
Insurance Law
Mineral Law
Municipal and Public Utility Law
Patent, Trademark, and Copyright Law
Probate, Real Property, and Trusts
Taxation
Torts, Persons, and Domestic Relations.

The meeting last month of the Corporation, Banking, and Mercantile Law Section, Ross C. Fisher, Chairman, was illustrative of progressive discussion of an important phase of the law. Martin Gendel, well-known attorney, read an exhaustive and illuminating paper on the law of preferences, the text of which was subsequently published in the Los Angeles Daily Journal. Also present at this meeting, and leading in the discussion, were the referees in bankruptcy of the United States District Court: namely, Hon. Hugh L. Dickson, Hon. Hubert L. Laugharn, Hon. Ernest R. Utley, and Hon. Benno M. Brink. The referees fully discussed the practical considerations involved, and the procedure to follow, in cases involving preferences.

The Criminal Law Section, under the chairmanship of Jerry Giesler, at its last meeting had the pleasure of hearing Robert Daru of New York, former counsel of the United States Senate Committee on Rackets, present plans for a new Criminal Code of Ethics and Principles for the Prosecution and Defense of Criminal Cases, recently adopted by the New York County Criminal Courts Bar Association. As a result of the discussion, and of the interest which followed, a subsequent meeting was held by the section to discuss the advisability of adopting the proposed code.

The Section on Torts, Persons, and Domestic Relations, Rollin L. McNitt, chairman, discussed the subject of tort liability of aircraft operators. David R. Faries, an authority on aviation law, led the discussion and traced the development of the law in this highly interesting field.

The Probate, Real Property, and Trusts Section, of which Lawrence L. Otis is the newly elected chairman, was fortunate in hearing A. M. Cross, a recognized authority on the law of joint tenancies, give an exhaustive dissertation on that subject. The discussion was both illuminating and instructive.

In surveying the calendar of future section meetings, it is heartening to note the sincere effort being extended by the officers of each section in developing programs which cannot fail to familiarize lawyers with problems that confront them in their daily work. It cannot be urged too strongly that every practicing attorney owes a duty to himself and his clients to join in the activities of at least one of the sections, and in that way keep himself abreast of the times and of many phases of the law.—S. M.

COMMENTS ON FLOURNOY v. WIENER

By Walter L. Nossaman

THE Bar Bulletin Committee has requested me "to write a short note" on Succession of Wiener, 203 La. 649, 14 So. (2d) 475 (1943), appeal *sub. nom.* Flournoy v. Wiener, dismissed, 88 L. Ed. Adv. Ops. 478 (Feb. 28, 1944). Determining nothing except an obscure point of federal practice, and coming to a premature and inglorious end, the case would ordinarily not be worthy of notice in this serious journal. But the Wiener case has some of the disquieting characteristics of an unexploded bomb which may burst in our faces. Accordingly, reversing the usual process, it may be worth while to point out what it did *not* decide.

It involved, and did not decide, the constitutionality of the 1942 amendment to Sec. 811(e), I. R. C., which—in substance and effect—purports to include all community property in the husband's estate for federal estate tax purposes, ignoring the wife's interest or ownership. It arose in this way: Louisiana, in common with California and other states, has a statute providing for "stepping up" the state inheritance tax in a sufficient amount to absorb the 80% credit allowed against the basic federal estate tax on account of state death taxes. Under Sec. 402(b) (2) of the Revenue Act of 1942 (I. R. C. Sec. 811 (b) (2)), the entire community estate of the decedent Wiener and his surviving wife having become subject to the federal estate tax, the amount of the state inheritance tax was correspondingly increased under the step-up provision. The Supreme Court of Louisiana held the inclusion in the decedent's estate of the community half of the surviving widow to be violative of the Fifth and Fourteenth Amendments, since the tax would be measured in part by property of a person other than the decedent.

Flournoy, the Tax Collector, through the Attorney General of Louisiana, appealed to the United States Supreme Court under Sec. 237(a) of the Judicial Code, permitting review of the final judgment of the highest court of a state when the validity of a federal statute is drawn in question and the decision is against its validity. The taxpayers (appellees) raised no question of jurisdiction, but the United States, as amicus curiae, through the Attorney General, argued for dismissal of the appeal. Since the jurisdictional question and that involving the merits came on for hearing at the same time, it became necessary that amici curiae inter-

ested only in the merits present their views or run the risk of not being heard.

The Court's reasons for dismissal of the appeal, turning partly on the alleged failure of the Louisiana Attorney General properly to assign errors, need not be discussed here. That these reasons were not self-evident is attested by Mr. Justice Frankfurter's dissent, in which Justices Roberts and Jackson concurred.

The United States not only attacked the jurisdiction of the Court, but on the merits sought to sustain the Act. On the other side, in addition to the appellee-taxpayers, two groups of amici curiae appeared. One consisted of taxpayers' committees and bar associations in various states, including in this latter category the State Bar of California, the brief being prepared by Louisiana lawyers, with some assistance from lawyers in Texas, Washington and California. The other group owed its organization to the public spirit and enterprise of our Attorney General, Robert W. Kenny, who brought about the participation of the Attorneys General of seven community property states and the Tax Commission of Oklahoma.

The arguments in opposition to the statute invoked the Fifth Amendment and the uniformity clause (Article I, Section 8, Clause 1) of the Federal Constitution. The Attorneys General contended that the Act constitutes an invasion by Congress of powers reserved to the states; that to uphold it would be a socially retrogressive step, which no previous decision constrains the Court to take.

The Assistant Attorney General of the United States, explaining in oral argument the Government's anxiety to have the case dismissed, said that the Government wanted to prepare and bring up its own case, although admitting, in response to questioning by the Court, that the record before the Court contained all the facts necessary for a decision on the merits. Surmise being an abundant and unrationed commodity, it seems permissible to hazard the guess that this anxiety may have been founded in a desire to have as a test case one more favorable to the government, less favorable to the taxpayer, than the Wiener case.

A matter of such importance to the government cannot be one of indifference to the community property states. The continuation of united effort among them until this issue is finally resolved is desirable, perhaps necessary. United effort will be possible only

through the cooperation of the bar. It has been suggested that in California the State Bar is the logical agency to serve as a clearing house for information as to what is being done or planned, both within and without the state, in the way of cooperative endeavor. The integrity of the community property system, now in jeopardy, may depend upon the cooperation accorded by all who are interested in this common undertaking.

LIMITED PARTNERSHIP INTERESTS AS SECURITIES UNDER THE CORPORATE SECURITIES ACT

By Herbert A. Smith,
Executive Deputy Commissioner of Corporations

THE terms "Corporate Securities Act," "Commissioner of Corporations," and "Division of Corporations" tend to be misleading in that each term refers to corporations and the corporate form of organization, and the quick conclusion may be reached that they refer only to securities generally associated with the corporate form, such as stocks, bonds, and debentures.

Lawyers generally are familiar with the term "Blue Sky" and to the regulations coming under that denomination concerning corporations. They may not be as familiar with the fact that the Corporate Securities Act is not limited to such types of securities but applies generally to situations in which an individual places his money or other things of value under the control of another with the promise or expectation of a return or profit.

Let us examine the Corporate Securities Act and the case law with reference to its applicability to the partnership form of business organization. In a limited partnership the general partner has all the rights and powers of a partner in a general partnership with the exceptions set forth in Section 2485 of the Civil Code. It might be said that the general partner has the full management and control of the business. A limited partner contributes cash or property to the partnership (Civil Code 2480) for which he may receive a share of the profits of the business (Civil Code 2491) and under certain circumstances the return of his contribution (Civil Code 2492).

The position of a limited partner is that of a person who has

placed his money or property in the control of another with the right to participate in the profits from the enterprise.

The Corporate Securities Act, in Section 2(a) 7, defines the word "security" as including any "stock, bond, note, treasury stock, debenture, evidence of indebtedness, *certificate of interest or participation, certificate of interest in a profit sharing agreement,* certificate of interest in an oil, gas or mining title or lease, collateral trust certificate, any transferable share, investment contract or *beneficial interest in title to property, profits or earnings,* guarantee of a security, and any certificate of deposit for a security."

A limited partnership interest would qualify as a "security" as defined in the Corporate Securities Act either as a "certificate of interest in a profit sharing agreement" or as a "beneficial interest in title to property, profits or earnings." Assuming that a limited partnership interest is a beneficial interest in title to profits or earnings, the question arises as to whether there is any sale of a limited partnership interest.

A "sale" under Section 2(a) 8 of the Act is defined as "every

disposition or attempt to dispose of a security or interest in a security for value." The word "sale" also includes "a contract of sale, an attempt to sell, an option of sale, a solicitation of a sale, subscription, or an offer to sell directly or by an agent or a circular letter, advertisement or otherwise."

Section 3 of the Act provides that "no company shall sell any security . . . or offer for sale, negotiate for the sale of or take subscriptions for any security of its own issue until it shall have first applied for and secured from the Commissioner a permit authorizing it so to do."

Section 2(a) 3 defines the word "company" as including all domestic and foreign corporations, associations, syndicates, joint stock companies and partnerships of every kind, and also individuals as hereinafter defined.

Section 3 might well read, in light of the definitions, "no partnership shall dispose of a beneficial interest in profits or earnings for value until it shall have first applied for and secured from the Commissioner a permit so to do."

It might be argued that the partnership is not selling an interest in the partnership since there may be no partnership in law until the sections of the Code have been complied with.

The position then would be that no individual could sell such an interest without complying with Section 3 of the Act. In other words an individual may not sell a beneficial interest in profits or earnings without a permit first had and obtained from the Commissioner.

What have the courts had to say on the question?

In People v. Simonsen, 64 Cal. App. 97 (1923), it is held that the defendants were partners and that the interests in the profit-sharing plan sold by them required a permit from the Commissioner of Corporations; and also that the requirement of a permit for the sale of partnership securities is not unconstitutional.

In Barrett v. Gore, 88 Cal. App. 372 (1928), the Court says: "It is not material whether at the time of the sale the vendor's organization constituted a partnership, voluntary trust, or association. All alike are prohibited from selling such securities without the written permission of the Corporation Commissioner"; and "money paid by a purchaser of units or shares in any company,

under such void sale, may be recovered in an action on assumpsit."

In People v. Oliver, 102 Cal. App. 29 (1929), the following is said: "If the instrument of sale creates a present right to a present *or a future* participation in either the income, profits or assets of a business carried on for profit, it is a "security" as defined in the Corporate Securities Act." A petition to have the cause heard in the supreme court was denied.

In People v. Claggett, 130 Cal. App. 141 (1933), the defendant contended that the investors regarded their relationship as a partnership. As to this the court says "even assuming (without deciding) that the relationship was such as was claimed by defendant, the result would be unavailing to him as far as it would tend to relieve him from the legal consequences of his act"; . . . the fact that a partnership existed among the several interested parties is immaterial. The criminal offense was alleged to have been committed, and the evidence adduced on the trial of the action was sufficient to establish the fact that the offense was committed, not by a partnership, but by defendant as an individual in selling the security in question." A petition to have the cause heard in the supreme court was denied.

In People v. Dysart, 39 Cal. App. (2d) 287 (1940), count XIV of the indictment charged the sale and issue of an interest in a business known as Mutual Land Owners, Ltd. (which was organized in the form of a limited partnership). The defendant Dysart contended that the said count did not allege a public offense. The court held that the count sufficiently alleged the commission of the public offense prohibited by the Corporate Securities Act and that there was no merit in the defendant's contention in that particular. A petition to have the cause heard in the supreme court was denied.

In People v. Dutton, 41 Cal. App. (2d) 866 (1940), the defendant Dutton was charged by information with having sold and issued "limited partnership agreements" without a permit. The defendant and appellant Dutton contended that the trial court erred in instructing the jury that the people's exhibits "are securities as defined in the Corporate Securities Act." The court referred to Section 19 of Article VI of the Constitution of California and said that the trial court was "authorized to determine as a matter of law and to instruct the jury regarding the legal effect of the terms of the challenged documents. In view of the

definition of the term 'security' as set forth in Section 2 of the Corporate Securities Act, there can be no doubt that as a matter of law the people's exhibits in question constituted securities and the court was authorized to so advise the jury. . . . Whether or not the documents in question constituted securities was not a question of fact, but one of law, upon which the court alone could pass." A petition to have the cause heard in the supreme court was denied.

Also, in the recent case of Churchill v. Peters, 57 A. C. A. 520, decided March 4, 1943, although the court stated that no legal limited partnership had been formed because of the failure to file the articles of limited partnership in the county clerk's office as required by Civil Code Section 2478, it held that the purported partnership interests were securities within the meaning of the Corporate Securities Act.

In view of the statutes and the decisions, it seems that the proposition that a permit is required for the sale of partnership securities of original issue, is not in the realm of doubt.

THE LAW'S DELAY—SO WHAT?

By Hon. Frank G. Swain,
Judge of the Superior Court

"ADMINISTRATIVE Boards are getting all the business away from the courts." For some years this has been the growing cry of the legal profession. I say, if administrative boards can do a better job than the courts, they should get the business. But can they do a better job?

Long experience has bred into Anglosaxons the consciousness that if liberty is maintained, the executive and the judicial branches of government must function independently of each other. Need for the Magna Charta was bred by executive tyranny; misconduct of George III impelled the framers of our Constitution to provide for an independent judiciary; since the time of Chief Justice Marshall the courts have been the guardian of the constitutional rights of free Americans. But this glorious history does not warrant us in sitting on our benches and doing nothing about the criticisms of the courts which are growing in intensity. I believe that the growth of administrative boards exercising judicial functions is made possible only by reason of the courts' shortcomings. The legal profession should not try to stem the tide of administrative ascendency by decrying it. It should welcome justifiable criticism and profit by it.

Three criticisms of the courts should be noted: 1. They are too expensive. 2. Their procedure is too slow. 3. The outcome of trials is too uncertain. Administrative boards have cut the expense of litigation by serving as investigator, prosecutor, judge and jury. They even draw pleadings for applicants. This saves money but some people do not like to have their prosecutor act as judge. The outcome is also more certain if the prosecutor acts as judge but so is a trial before Hitler or one of his satellites. Speaking of uncertainty of outcome, may I point out that in no instance has our legislature provided for a jury trial before a commission. However, the purpose of this article is not to discuss all criticisms of the courts but to make some observations on the shortcomings which come under the heading, "the law's delays."

Recently I finished the trial of the heirship proceedings in the estate of Michael F. O'Dea. When I discharged the jury I said: "This trial began October 21, 1942, and ended March 7, 1944. The courts and the legal profession cannot derive any satisfaction

from the fact that this trial has lasted more than a year and four months. And that is not the whole story. Mr. O'Dea died January 23, 1938. It has taken the court more than six years to decide who his heirs are. There may yet be an appeal. Neither the court nor the legal profession should try to minimize the fact that this delay reflects no credit upon them. Having acknowledged this, we should demonstrate that within the legal profession itself there is the vigor, willingness and intelligent leadership to correct it." After delivering myself of that profundity, I relaxed somewhat unctiously until the editor asked me: What can be done about it? I do not claim to come under the heading "intelligent leadership" but I have a few ideas on the subject for your consideration.

The first fundamental cause of delays in a trial is the judge. There should be an improvement in two ways. The position of the judge in a trial should be improved and the quality of the judge in our trial courts should be improved. A judge has too long been regarded as a referee who should sit by to enforce the rules but who should not take any active part in the trial.

In *Farrar v. Farrar* (1919) 41 Cal. App. 452, 457, the court said: "It is time it was understood that a trial judge does not sit as a mere referee in a contest of wits between counsel in the case, but that it is not only within his province, but it is his duty, to see that as nearly as possible the issues shall be disposed of on their merits; and it is not out of place for him to call attention to omissions in the evidence or defects in the pleadings which are likely to result in a mistrial."

There has been a definite move to improve the position of the judge in a trial but the judges and the members of the bar are slow to welcome the change. A good illustration of this move and the reaction of the courts to it is the constitutional amendment adopted in 1934 which allows a judge to comment on the evidence (Const. VI sec. 19). This amendment got the cold shoulder from the District Court of Appeal the first time it came before a reviewing court. In the case, *People v. Talkington*, 8 Cal. App. (2d) 75, the court said (p. 90): "While the court has a right to comment upon the evidence, the testimony and credibility of any witness, that section of the Constitution does not admit of an argument being made by the court to the jury under the appellation of 'comments'." I ask you, what in heaven's name are com-

ments except arguments? That statement, if followed literally, would have repealed the constitutional amendment. But the Supreme Court took a kindlier attitude toward the amendment in *People v. Ottey*, 5 Cal. (2d) 714. It said (p. 723): "A very distinct and important innovation in the long-standing rule in this state was brought about by the constitutional amendment. It was the intention to place in the trial judge's hands more power in the trial of jury cases and make him a real factor in the administration of justice in such cases, instead of being in the position of a mere referee or automaton as to the ascertainment of the facts. To the seasoned practitioner in our state courts this so-called radical change has no doubt come with considerable of a shock. None the less the change has been made and it must be recognized as an endeavor to remedy an evil in the trial, especially of criminal cases, by jury." But, after expressing such commendable and forward-looking sentiments, the court said (p. 729): "Although the power of the judge to express an opinion as to the guilt of the defendant exists, it should be exercised cautiously and only in exceptional cases." Why, I ask, should a power admittedly designed to improve and modernize the administration of justice be exercised only in exceptional cases? This attitude on the part of reviewing courts has deterred trial courts from making general use of this power. Consequently it has not accomplished all that its proponents hoped or all that it should. Trial courts cannot improve their methods unless they receive the support of the appellate courts. The power exists in this instance but the courts, both trial and appellate, must bear the blame of not using it fully.

This is only one example of what I mean. The trial judge has other powers. The duration and scope of the argument are largely in the discretion of the court. "The trial court is at liberty to change the ordinary methods of procedure when by so doing the time of the court and the parties will be conserved rather than wasted." (*Egan v. Crowther*, 74 Cal. App. 674, 678.) The trial judge can often save a vast amount of time by questioning witnesses and he has the power to do this. But lawyers often resent the exercise by the judge of these and other powers whereby the judge steps out of his role of referee. Maybe this is because of the manner in which some judges do those things. A remedy for that comes under the next heading, improvement in the quality of the trial judge.

If a judge is to be given more power in a trial and if the bar is to be willing that the judge exercise that power, there is little doubt that there must be an improvement in the quality of our judges. I wish to be entirely impersonal about this. Why shouldn't I? I live in a glass house. Many plans have been suggested for improving the quality of the judiciary. They are largely concerned with methods of selecting and retaining judges. All look toward taking the judge out of politics. We must have an independent judiciary. In my opinion the unrestricted power of a governor to appoint judges is a failure. I am not talking about our present governor. He has shown a great sense of responsibility in making judicial appointments; he has shown a genuine desire to improve the bench; he has also adopted the commendable policy of referring his nominees to The State Bar before he appoints them. But too many governors here and elsewhere have looked upon judicial appointments merely as a means of paying political debts. As a result the bench, the bar and the public have suffered. I am greatly interested in the Missouri plan whereby a commission, which is an nonpolitical as possible in its make-up, nominates some five persons from whom the governor must make his appointment. This is much better than a system whereby the governor nominates and a commission or a branch of the legislature confirms. That such a system would give better judges in California is seen in the working of the California Youth Authority law which provides for nomination of two members of the Authority by a special commission which proved to be interested primarily in getting the best possible men for the job. The electorate is jealous of its right to elect judges. But in a county the size of Los Angeles it is absolutely impossible for the voters to know the qualifications of a man who has never been on the bench or to be acquainted with the qualifications of all the judges who are on the bench. A judge should not have to conduct a political campaign. It is generally a silly performance which demonstrates not his ability on the bench but his ability to get votes. All candidates, according to their billboards, are capable, honest and fearless. If the method of appointing judges were changed from a political to a merit basis (such as by adoption of the Missouri plan), we could expect that only the ablest men would be appointed to judicial office. Such men should be retained for life, thereby making them as free from politics as our

Federal judges. So much for the improvement in the judges, both in position and quality.

The second part of this world-shaking (?) contribution to elimination of the law's delays concerns the lawyers. Having improved the judges beyond all recognition, I now turn to the bar. That is enough to make any one turn to the bar. Gentlemen, will you think me unkind if I say that many lawyers are too long winded? May I say that a judge sometimes feels that a lawyer in organizing his material, both for the presentation of evidence and for argument, exhibits a mind of little selectivity. Mental selectivity on the part of the lawyer saves much time and makes the case much clearer to the judge and to the jury. Most cases depend on a comparatively few elements, both factual and legal. The most successful trial lawyer is one who recognizes the essentials of his case and devotes his energy to presenting those. Some lawyers have no conception of the limits of human endurance (both jurors and judges are human) in listening to examination of witnesses and to argument. My experience is that it is easy to listen to a lawyer who is covering ground but not to one who is wasting time on nonessentials or in unnecessary repetitions. We need better trained lawyers. Trial work is a highly specialized art. Again, in our courts, much time is wasted by unnecessary objections. I am told that in the English courts it is the exception rather than the rule for a barrister to make an objection. The judge takes the responsibility of keeping the proceedings on the beam, so to speak.

That brings up the question of the rules of evidence. Undoubtedly courts are criticised because of the rules of evidence. The layman feels they are too technical. For that reason our legislature has freed most of our commissions from them entirely (sometimes with sad results). In my opinion rules of evidence should be regarded as flexible guides for getting the most trustworthy proof of facts before the courts rather than a hard and fast set of rules, violation of which is reversible error. The spirit of the law of evidence is the thing.

I could go on at great length with other suggestions but I do not wish to be too long winded. When I was in Officers' Training Camp during the last war a doctor delivered us a lecture on sanitation of kitchens, barracks, etc. I have forgotten all but his last sentence which was, "If you do all of these things you will be wonders." So I say to you, if you do all or any of these things, you will be wonders. I thank you.

COURT REPORTERS IN FEDERAL COURTS

A NOTE ON RECENT LEGISLATION

By Philbrick McCoy

ON January 20, 1944, the President approved "An Act to authorize the appointment of court reporters in the district courts of the United States, to fix their duties, to provide for their compensation, and for other purposes." Section 1 of the Act amends section 5a of the Judicial Code. Under this new law, which is now Chapter 3 of the Laws of the 78th Congress, Second Session, each district court of the United States is to appoint one or more court reporters, the number to be determined by the Judicial Conference of Senior Circuit Judges.

Section 1 of the law provides that a reporter shall attend each session of the court and record verbatim "(1) all proceedings in criminal cases had in open court whether in connection with plea, trial, or sentence; (2) all proceedings in all other cases had in open court unless the parties with the approval of the sitting judge shall specifically agree to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule of procedure or order of the court or as may be requested by any party to the proceedings." The Act contains provisions for the preparation of transcripts and the compensation of the reporters on a salary basis, the salary to be fixed by the Judicial Conference, which is also charged with the administration of the Act. The Act also requires that the reporter shall certify "the original shorthand notes and other original records" taken by him and file them with the clerk of the court, who shall preserve them in the public records of the court for not less than ten years.

In principle, this new federal law is similar to Section 261b of the California Code of Civil Procedure which was added to the Code in 1943.

"AND FOR OTHER PURPOSES."

Section 3 of Public Law 222 provides: "Upon request of

the appellant, the record on appeal, under rules 75 and 76 of the Federal Rules of Civil Procedure, shall be printed by a printer designated by the appellant." Under Rule 19 of the Rules of the United States Court of Appeals for the Ninth Circuit, as it now reads, the appellant has no choice in the selection of the printer; the record is to be printed under the supervision of the clerk, who is "charged with the duty of having the printing done at reasonable rates" at the expense of the appellant, who must pay to the clerk the amount of the estimated cost within ten days after being notified of the amount or have his case dismissed.

The obvious purpose of this provision of Public Law 222 is to enable appellants to enter into private contracts with printers of their own choosing for the printing of records on appeal, and make their own financial arrangements, even though the supervision of the printing of the record will probably remain with the clerk of the Circuit Court of Appeals. It seems likely that some amendments to Rule 19 will have to be made to conform with this new provision of the statute and enable the appellant's attorney to make all arrangements for the printing of the record.

THE PLEAS OF GUILTY AND "NOLO CONTENDERE"

—A DISTINCTION WITHOUT A DIFFERENCE

By Maurice Norcop of the Los Angeles Bar

IN criminal pleading in the Federal Courts there are but two pleas to the general issue:

(a) The plea of not guilty.

(b) The plea of guilty.

The defendant accused of a criminal offense may freely enter either plea.

The accused may not, however, enter a plea of "nolo contendere" without formal leave of the Court. Such permission may be extended to the defendant by the Court as an act of grace. In practice, the defendant through his counsel confers with the Government counsel and persuades him to recommend the plea of "nolo contendere" to the Court. If the Government counsel declines to do so, the defendant through his counsel may, nevertheless, tender the plea of "nolo contendere" to the Court. The Court thereupon ascertains the views of the Government counsel as well as the defense counsel concerning the merits of the tendered plea. The plea of "nolo contendere" is in the nature of a compromise plea. And if the Court believes the defendant's past record as a law abiding person has been outstanding, or that there are other extraordinary mitigating factors relating to the case before him, he may accept the plea and order its entry by the clerk. The acceptance or rejection of the plea is entirely a matter of judicial discretion by the court. If the tendered plea is rejected by the court the defendant must thereupon enter a plea of either not guilty or guilty.

After the plea of "nolo contendere" has been accepted by the court and entered by the clerk, what is the difference in legal effect, if any, from a plea of guilty? The legal effect of a plea of "nolo contendere" is the same as a plea of guilty. It is an implied confession of guilt, whereas the plea of guilty is a direct confession of guilt, but for all practical purposes the plea of "nolo contendere" is one of guilt. *United States v. Norris*, 281 U. S. 619.

It has been judicially determined that a plea of "nolo con-

tendere" is not actually a plea in the strict sense of that term. *Tucker v. United States,* 196 Fed. 260, 262.

By the plea of "nolo contendere" the accused simply says: "I will not contend with the prosecution."

In *Tucker v. United States, supra,* the Court in the opinion makes the following statement:

> "(1) How is the plea of nolo contendere thus limited and defined?
>
> "These premises for the inquiry are well recognized alike in all the citations: The so-called plea raises no issue of law or fact under the indictment, is not one of the pleas, general or special, open to the accused in all criminal prosecutions, and is allowable only under the leave and acceptance by the court. It is not a plea, in the strict sense of that term in the criminal law, but a formal declaration by the accused, that 'he will not contend with the' prosecuting authority under the charge. When accepted by the court, it becomes an implied confession of guilt, and, for the purpose of the case only, equivalent to a plea of guilty, but distinguishable from such plea, in that it 'cannot be used against the defendant as an admission in any civil suit for the same Act.'"

And in another case the Court states:

> ". . . the plea is, in some respects, in the nature of a compromise between the State and the defendant." *Hocking Valley R. Co., v. United States,* 210 Fed. 735, 739.

The plea of "nolo contendere" had its origin in the common law of England and came to the United States courts from that source; but curiously there is no record of its use in English courts since 1702. It is, therefore, allowed in the United States courts under the authority of the common law. It is also allowed in 14 or 15 of the states under the common law. Two states—Colorado and Massachusetts, provide for the plea by statute.

The only mention of the plea of "nolo contendere" in the federal statutes is in the Probation Act which was passed in 1925. The pertinent language there reads:

> "The courts of the United States . . . shall have power, after . . . a plea of guilty, or nolo contendere . . . to suspend the imposition or execution of sentence and to place the defendant upon probation. . . ." 18 U. S. C. A. 724; 43 Stat. 1259.

After the plea of "nolo contendere" has been entered what

punishment may be imposed? Prior to a recent decision by the Supreme Court, some of the lower courts held that no more than a fine could be imposed as punishment, but the Supreme Court definitely settled the question and held that the court has the power to inflict the same punishment on a plea of "nolo contendere" as on a plea of guilty. *Hudson v. United States,* 272 U. S. 451.

The sentence imposed may be for the maximum term of imprisonment authorized by law, together with a fine. In the *Hudson* case, the Supreme Court upheld the sentence of imprisonment, which had been imposed by the trial court. In concluding its opinion, the Supreme Court in the *Hudson* case, said:

> "Undoubtedly, a court may, in its discretion mitigate the punishment on a plea of 'nolo contendere' and feel constrained to do so whenever the plea is accepted with the understanding that only a fine is to be imposed. But such a restrfiction made mandatory upon the court by positive rule of law could only hamper its discretion and curtail the utility of the plea."

In actual practice the courts with practical unanimity, decline to accept the plea of "nolo contendere" with any restrictions. They accept the plea unconditionally and are thereafter free to impose such punishment as they deem just in the particular case, and the court may impose the maximum punishment authorized by law.

According to the holding of a recent case, on entering such a plea, nothing remains to be done, except to pronounce sentence. The accused is subject to immediate sentence including prison sentence. *United States v. Denniston,* 98 Fed. (2d) 696, 698 (certiorari denied, 300 U. S. 709).

One of the best statements concerning the plea of "nolo contendere" appears in the decision of *Hudson v. United States,* 9 Fed. (2d) 825, in the Circuit Court of Appeals for the 3rd Circuit. That opinion is expressly approved by the Supreme Court in *Hudson v. United States, supra.* The Circuit Court said at page 825:

> "The plea of nolo contendere was long known at common law. It was there regarded, not as a plea of right, but as a plea of grace, to be accepted or refused by the court in its discretion. This was because the plea was neither one of guilty nor one of not guilty, but rather

> an appeal for mercy. Being in form a declaration by the accused that 'he will not contend with the' prosecuting authority under the charge, it was not, in the strict sense of that term in the criminal law, a plea at all. It was, however, treated as a plea and its effect, when entered, was that of a confession of guilt, and on a record thus made, sentence could validly be imposed; but the confession, implicit in the plea, could not be used against the defendant in any civil suit for the same act. This, briefly, was the common law understanding of the plea of nolo contendere, and, in the absence of federal statutes providing for its use or varying its meaning, this also is the nature of the plea in federal jurisprudence."

There is one very valuable feature of the plea of "nolo contendere" which distinguishes it from a plea of guilty. It is not binding on the defendant in a civil suit based upon the same facts. As one court has said:

> "When accepted by the court it becomes an implied confession of guilt, and, for the purposes of the case only, equivalent to a plea of guilty, but distinguishable from such plea, in that it cannot be used against the defendant

> as an admission in any civil suit for the same act." *Tucker v. United States,* 196 Fed. 264, 262.

The defendant is not estopped in a subsequent civil proceeding to deny the facts upon which the criminal prosecution was based. Therefore, disregarding the punishment which may be imposed on the plea of "nolo contendere," its entry in the criminal case may enable the accused in a subsequent civil suit to defend successfully under the same facts and therein lies the most valuable use of the plea.

PRESUMPTIONS: COMMENT ON TOT v. UNITED STATES

By William G. Hale
Dean of the School of Law, University of Southern California

THE Federal Firearms Act provides that possession of a firearm by one who has previously been convicted of a crime of violence "shall be presumptive evidence" that it was received in interstate shipment. In *Tot v. United States,* 63 Sup. Ct. 1241, 87 L. Ed. (Adv. Ops.) 1119 (1943), the Government proved possession by Tot and his prior conviction of a crime of violence. The defendant moved for a directed verdict, assigning as one ground the failure of the Government to introduce any evidence that the gun was received in interstate shipment, this being one of the elements of the crime as defined by the Act. The motion was denied and the defendant was convicted. The United States Circuit Court of Appeals for the Third Circuit, affirmed the conviction. The Supreme Court by unanimous decision reversed the case on the ground that the presumption provision was unconstitutional since there was "no rational connection between the fact proved and the ultimate fact presumed." Mr. Justice Roberts stated the test of constitutionality as follows:

> "Under our decisions, a statutory presumption can not be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience."

This thesis I believe to be thoroughly unsound. It springs

primarily, I believe, from a misconception as to the true nature and function of presumptions.

If we assume that by definition facts X and Y are essential to defendant's liability, in a given case, and if we assume that the plaintiff has the burden, at least, of going forward with the evidence to the point where he has made out a prima facie case, then any attempt either by legislative or judicial fiat to make fact X, proved by ordinary processes, evidence of Y, if X bears no logical relation to Y, must fail as a violation of due process. If proof is essential, it can not be furnished by any arbitrary assumption. Hence, if a presumption, so-called, is to serve as a part of the rational process of proof, it must fall constitutionally if no logical inference can be drawn from the basic fact to the presumed fact. Moreover, even if the element of logical inference is present in a presumption, it is not the presumption that is evidential but rather the core of logical inference which underlies the presumption. The presumption, qua presumption, could then serve at most to require the judge, perchance in his denial of a nonsuit, to do what he might well have done in the absence of the presumption.

But I submit that the office of presumptions is not to be found in the field of proof, *i.e.,* they are, as presumptions, neither in whole nor in part evidentiary. It is true that they are often stated in terms of evidence, even as in the Federal Firearms Act; and no doubt thereby hangs the tale of confusion in which the law of presumptions is involved. I do not see how we can get out of this tangle until we see the presumption merely as a procedural device, primarily a way, withal perhaps awkward, of fixing the burden of going forward with the evidence (or perhaps the burden of persuasion) on certain issues of fact. The finding then in accordance with the presumed fact and by reason of the presumption neither requires nor implies a finding that the presumed fact actually exists. The decision arises rather from the default of the party against whom the presumption operates in not meeting his burden of going forward with the evidence and to the point where a finding in his favor of the non-existence of the presumed fact would be justified.

Now from the standpoint of constitutional law the question becomes whether this fixing or shifting of the burden is sustain-

able. We can bring this question into the open, freed from the obfuscations of a presumption terminology, by assuming that the statute is revamped so as to fix the burden by its express terms. Viewed in this light it will be quite clear that the existence of a rational inference against the party upon whom the burden is placed can not be made the *sine qua non* of constitutionality. Tracing the long history of allocation of burden of going forward with the evidence or burden of persuasion through its weaving and disconnected course one will look in vain for any single controlling principle for determining where the burden shall be, whether the search be in the field of civil or criminal procedure. In many instances the specific principle may be difficult to find. Why, for example, in one jurisdiction is the burden of proving absence of contributory placed upon the plaintiff and in another the burden of pleading and proving contributory assigned to the defendant? Why is infancy an affirmative defense in contracts? What of the various rules relative to insanity and self-defense in criminal cases, where the defendant may even have to carry the burden of persuasion? The truth is that a variety of practical considerations (occasionally probably an historical accident), serves to explain the wide and mixed allocation of burdens both in our civil and criminal procedure. We thus conclude that insofar as the Supreme Court in the *Tot* case was looking at the validity of the statute as involving merely an allocation of the burden of going forward with evidence to the defendant on the issue of the receipt of the weapon in interstate commerce, its holding of unconstitutionality based upon the absence of a basis of rational inference as to such receipt can not stand up under a fundamental scrutiny. Definitely one additional adequate and precedent-supportable reason for placing the burden of going forward with the evidence upon a defendant even in a criminal case can be found where the facts on the specific issue are specially within the knowledge of the defendant. (See Mr. Justice Cardozo in *Morrison v. California,* 291 U. S. 82, 88-89, 54 Sup. Ct. 281, 284, 78 L. Ed. 664, 669 (1934), and Mr. Presiding Justice Peters, *People v. Pay Less Drug Co.,* 61 A. C. A. 889, 898 (1943). Moreover, we believe that there are other equally sound practical considerations which may satisfy the

rather elastic requirements of due process and equal protection in the exceptional allocation of a procedural burden.

I do not mean by this that I favor any widespread or free and easy imposition upon defendants in criminal cases of the burden of showing either in whole or in part his innocence. The long history of our criminal jurisprudence establishes a general principle quite to the contrary. The departures from this principle should be exceptional and should, therefore, find support only where a reasonable basis can be found for them. The *Tot* case presented a real challenge in this respect. My quarrel with the case is directed not especially at the result, but rather at the narrow and arbitrary test of constitutionality enunciated and relied upon. My thesis is that the absence of the element of logical inference is not in itself sufficient to render the act unconstitutional.

(For further criticisms of the *Tot* case see Morgan, 56 Harv. Law Rev., 1324 (July, 1943); McCormick, 22 Tex. Law Rev. 75 (Dec., 1943); Hale, 17 Southern California Law Review 48 (Nov., 1943)).

(For a more thorough treatment of this and other phases of

the subject of Presumptions, consult: Morgan, Federal Constitutional Limitations upon Presumption created by State Legislation, Harvard Legal Essays (1934) 328-356, 2 Selected Essays on Constitutional Law (1938) 1500; Morgan, Further Observations on Presumptions, 16 Southern California Law Review 243 (1943)).

ARE WE SUPREMELY INCOMPETENT?

By Frank G. Tyrrell, Judge of the Municipal Court

LAWYERS and judges certainly ought to know the meaning of the word, "incompetent"; we use it and hear it daily, almost hourly, in the objection, "immaterial, irrelevant and incompetent." And that objection, by the way, is most redundant. To be sure, the question against which it batters its way may be all these, though usually it is not; if it is either, the objection should be sustained, without the redundant phraseology.

But the serious question raised here is, are we judges and lawyers incompetent? and not merely incompetent, but are we preeminently so in this busy, war-scourged world? Some years ago Honorable Wm. Rhodes Hervey retired from the Superior Court bench and went into the banking business. Shortly after in conversation he did not hesitate to contrast the tempo of the courts with that of business, asserting that any man in business who should dare to adopt the lethargic, leisurely pace of the courts and the lawyers would be uncermoniously dropped from the ranks.

Writing in the Journal of the American Judicature Society, April, 1937, on the intriguing topic, "Improving the Administration of Justice," William L. Ransom said:

> "Judging the court by present-day efficiency standards and looking upon it as a mechanism for bringing about a result, the average court is the most indirect, inefficient, uneconomical and unintegrated instrumentality in the modern state; and the wonder is, not that justice is at times so inexactly and tardily administered, but that substantial justice between man and man is so often the outcome of proceedings in such a tribunal."

There is a ringing statement that we are "supremely incompetent." And if it is permissible to compare the courts and business, with

respect to competence and celerity, any thinking person, on the bench or at the bar, will have to admit it.

To be competent is to be fit, capable, adequate, powerful. The opposites appall one: unfit, incapable, inadequate, weak! Are we all these? If the accusation is in any degree valid, is it strange that business is turning or being turned to the administrative tribunal? that courts and lawyers are in growing disfavor?

Obviously it is our procedure that brings us into disrepute. Private and even public business is direct, exact, expeditious. One can but wonder what the modern efficiency expert would say of our procedure in court in comparison. Would he not rise in his wrath and denounce us for retaining the technique unchanged from that of the time of the ox cart and tallow dips?

For of course it is procedure that lags; our substantive law is seldom the target for the shafts of the adverse critic. This can be and is being constantly changed, but procedure stagnates in the control of the bar and the courts.

If the skeptic on the bench happens to be aware of this deplorable condition, what can he do about it? Take for example the frequently futile, prolix, tiresome and hurtful—to the interrogator—cross-examination; suppose the judge stops it. The cross-examiner does not realize that he is doing him a favor, but resents the curtailment. And that all too frequent, "Call the defendant under 2055!"—what shall be said of that? Always when it goes beyond a question or two, such as ownership, etc., it puts the case on wrong end to, and mingles negative and defensive matter with the case in chief. Defendant is a reluctant witness; his reluctance slows the wheels of justice.

It is doubtful if any man or woman who has had any experience on the bench can be found who will not confess that the trial time of most cases is at least twice what is really necessary. The fact is, that a case presented with directness and expedition is clearer and stronger than one that drags its slow length along, regardless of time. And yet the whole profession insists on running in low gear. Who profits by this yielding to the momentum of the past? Everybody loses.

Groundless and needless objections with their supporting arguments, repetitions, querying about what the pleadings have

admitted, circumambient interrogation, eliciting things immaterial or irrelevant, and pursuing a point through a thicket of ideas till lost in the jungle,—these are some of the indications of a lack of competency. And yet, while the lawyer knows these things, he continues to play the part with cavil and quiddity, as if he were an automaton moved by some weird and irresistible external power.

And what of "his honor" through all this? Well, ordinarily the judge acquiesces. Why not? We make judges out of practicing lawyers; he has been schooled in the art of managing the ox cart, and is utterly indifferent to the motor cars and airplanes that whiz by him and above him in the world of business. The administration of justice, he knows, requires deliberation; there must be dignity and decorum in the court room. And so from a world in which events move with ever increasing speed, in which transactions involving millions are concluded on the snap of a finger in the pit on 'change, he marches into the courtroom and becomes accessory to the perpetuation of a technique which should have been abandoned ages ago, because outmoded and outgrown.

Besides, the judge in office must be prudent and politic, forsooth. If he gets the reputation of being masterful and arbitrary, woe betide him in the next primary election! He will find himself opposed by an array of aspiring legal talent that will cost him dear, or even usher him into the oblivion of private life! What a fate!

The California bar is full of men of light and leadership; we have led out with the integrated bar; our associations and lawyers' clubs are alert and awake; we are grading up our law schools; we are recognizing cheerfully and intelligently our social obligations; we know something about the sciences auxiliary to the law,—sociology, psychology, psychiatry, etc.; why do we not add to our laurels by revising our antiquated procedure, and bringing the entire practice of law and the administration of justice up to concert pitch? At least we can eliminate the discordant notes in our orchestra. We can if we will; but will we?

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